U.S.
FILED

No. 09-510

In The
Supreme Court of the United States

JARED L. DILLON,

Petitioner,

v.

MOUNTAIN COAL COMPANY, L.L.C.; ARCH WESTERN RESOURCES, L.L.C.; and ARCH COAL, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tenth Circuit's decision that Petitioner failed to present sufficient evidence to show that he was regarded as disabled in the major life activity of working under the prior version of the Americans with Disabilities Act was correct, given that the court's opinion on the issues stated by Petitioner does not conflict with a decision of this Court or another court of appeals.

PARTIES TO THE PROCEEDING

This case was originally brought by four plaintiffs: John R. Bartlett, Michael E. Clawson, Jared L. Dillon, and Thomas E. Richards. The district court dismissed the claims of Bartlett and Richards, and they did not appeal. Clawson later settled his claims and did not participate in the appeal. Petitioner Dillon was the sole appellant in the Tenth Circuit. Mountain Coal Company, L.L.C., Arch Western Resources, L.L.C., and Arch Coal, Inc. were the defendants in the district court and the appellees in the Tenth Circuit.

RULE 29.6 DISCLOSURE STATEMENT

Mountain Coal Company, L.L.C. is wholly-owned by Arch Western Bituminous Group, L.L.C., which is wholly-owned by Arch Western Resources, L.L.C. That entity, in turn, is 99% owned by Arch Western Acquisition Corporation, which is wholly owned by Arch Coal, Inc.

Arch Coal, Inc. is a publicly-traded corporation. No publicly-held companies own 10% or more of its stock.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the definition of "disability" under the prior version of the Americans with Disabilities Act (the "ADA" or "Act"), 42 U.S.C. § 12101 *et seq.* (1990), which was in effect before its amendment by the ADA Amendments Act of 2008 (the "ADAAA"). The pertinent provisions of the ADA are reproduced in the Appendix to the Petition. The pertinent regulations, 29 C.F.R. §§ 1630.2(j) and (l) (1991), are reproduced in the Appendix to this Opposition at 1a.

INTRODUCTION

Petitioner has presented no compelling reasons for the Court to grant his Petition for a Writ of Certiorari. Petitioner submits four questions for review. Yet none of those questions presents a conflict between the Tenth Circuit's decision and prior decisions of this Court or another circuit court; and none presents a matter of important legal consequence, particularly because the issues raised by Petitioner do not apply to future claims following the 2008 amendments to the ADA.

This case does not present any novel issues of federal law. Petitioner claims that he was regarded as disabled in the major life activity of working and was discriminatorily discharged from his position as an underground coal miner. The Tenth Circuit applied the well-settled standards pertaining to such claims

under the ADA – standards that have been set forth in regulations of the Equal Employment Opportunity Commission ("EEOC"), expounded upon by this Court, and applied consistently by the circuit courts – in concluding that Petitioner failed to present sufficient evidence to establish that he was regarded as substantially limited in the performance of a class of jobs or a broad range of jobs.

Petitioner argues that there are various circuit splits on the application of these standards, including (a) the use of pretext evidence to show that an individual is regarded as disabled, (b) the need for evidence of the job market in the relevant geographic area, (c) the ability to satisfy the burden of proof with evidence of the jobs available within a single facility, and (d) the impact of a no-restrictions policy on the regarded-as-disabled analysis.

In fact, the circuits have not divided on these issues. The circuit courts have agreed on the applicable legal standards for regarded-as-disabled claims, but have simply applied those standards differently based on the particular facts of each case – which is entirely appropriate given the highly individualized nature of disability claims.

Nor do these matters have continuing relevance. All the issues raised by Petitioner are moot following Congress's passage of the ADAAA in 2008. Under the prior language of the ADA, plaintiffs like Petitioner had to prove they were regarded as substantially

limited in a major life activity. Now, regarded-as-disabled plaintiffs only need to show that they are regarded as having an impairment, regardless of whether that impairment is perceived to limit a major life activity. Accordingly, any ruling on the issues raised in the Petition would not apply to future ADA cases and would result in an inefficient and unwise exercise of the Court's certiorari jurisdiction.

For all these reasons, the Petition should be denied.

STATEMENT OF THE CASE

1. *Factual Background.* In 1997, Petitioner Jared L. Dillon began working as an Underground Maintenance Mechanic at the West Elk Coal Mine operated by Mountain Coal Company, L.L.C. ("Mountain Coal") near Somerset, Colorado. Court of Appeals Appendix ("C.A. App.") 2282, 2879, 3562, 3566, 3658. The position involved various physically demanding tasks, including repairing mechanical mining equipment and hydraulic, electrical, and conveyor systems. *Id.* at 2282, 2285.

Petitioner sustained neck and back injuries in 1999 and worked at Mountain Coal only a short time thereafter, mostly on light duty assignments. *Id.* at 3426-27, 3515-16, 3576, 3615-17. Petitioner's doctor eventually placed him at maximum medical improvement ("MMI"), gave him a permanent partial impairment rating, and ordered lifting restrictions of no

more than fifty pounds maximum and twenty-five pounds occasionally. *Id.* at 2342, 2346, 3427.

After Petitioner exhausted his short-term disability benefits, reached MMI, and received his permanent lifting restrictions, Mountain Coal determined that he could not perform the duties of his position consistent with his restrictions and that there were no other vacant positions at the mine that he was qualified to perform. *Id.* at 2354, 3425, 4068. Accordingly, Mountain Coal terminated his employment in January 2000. *Id.* at 2354, 3425.

Petitioner and three other plaintiffs filed ADA claims against Mountain Coal and two of its parent companies, Arch Western Resources, L.L.C. and Arch Coal, Inc. *Id.* at 231-82. The district court dismissed two of the plaintiffs' claims on summary judgment. *Id.* at 35-36. Petitioner and the other remaining plaintiff proceeded to trial, at which a jury found in their favor on claims alleging that they were regarded as disabled under the ADA, denied reasonable accommodations, and (as to Petitioner) terminated because of a disability. *Id.* at 986-93. The jury also found that the three Respondents acted as an integrated enterprise and, thus, were jointly liable. *Id.* at 986-87.

The district court granted Respondents' motion for judgment as a matter of law under Fed. R. Civ. P. 50 with regard to Petitioner, but denied the motion as

to his co-plaintiff.[1] Pet. App. 18a-58a. Petitioner appealed. C.A. App. 1667-69. A panel of the Tenth Circuit affirmed the decision. Pet. App. 1a-17a. The Tenth Circuit also denied Petitioner's request for rehearing by the panel or *en banc*. *Id.* at 59a-60a.

2. *Response to Petitioner's Factual Assertions.* As Petitioner points out, the parties disputed at trial the number of job titles or positions utilized at the West Elk Mine and the lifting restrictions applicable to each of them. The evidence shows only that the above-ground Warehouse Technician position could be performed within Petitioner's restrictions. C.A. App. 2290-93, 3421. While Petitioner refers to other "jobs," such as "lube man" and "fuel hauler," Pet. at 2-5, Mountain Coal treated these as assignments within the positions of Underground Production/Utility Miner and Underground Maintenance Mechanic. C.A. App. 3974-75, 4056-58. Mountain Coal recognized only those two underground positions, with different primary assignments within them, due to the need for flexibility in the remote and potentially dangerous underground mining environment, where employees must be able to perform the variety of tasks needed at any particular time. *Id.* at 3975-80. Petitioner elicited very little evidence at trial about the nature of these

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[1] The parties disputed whether the district court granted the motion under Rule 50(a) or 50(b). However, as the Tenth Circuit noted in its decision, that issue "does not affect [the] analysis." Pet. App. 4a.

individual assignments or any other positions within Mountain Coal.

The parties also disputed the extent to which the so-called no-restrictions policy was enforced, with Mountain Coal presenting evidence that it applied other policies requiring the accommodation of disabilities, reviewed individual restrictions, and allowed some employees to work with medical restrictions if they could perform the essential functions of their jobs with or without reasonable accommodations. *Id.* at 2305, 2307, 2318-19, 2335-36, 2416, 2873, 3446-49, 3465-67, 3470-71, 3588-89, 4151-52.

Additionally, the parties disputed certain events leading up to Petitioner's termination, as well as the application of Mountain Coal's policies to Petitioner. Even taking all the evidence in the light most favorable to Petitioner (as the Tenth Circuit did), at most, he showed that: (a) when he complained to his supervisor about being in "severe pain" whenever he tried to work, his supervisor suggested that "if it was my position, I would go home and not come back until someone had got you fixed correctly because there is something obviously wrong," and he took that advice and went home; (b) he called the Human Resources Manager about his return to work and was purportedly told that he could not come back unless he had no restrictions, although he had previously been allowed to work with restrictions; and (c) the Human Resources Manager, who recommended his termination, testified that the lifting restrictions imposed on him "aren't even close to what our physical demands

analysis require" and that there were no other vacant jobs at the mine that he was qualified to perform. *Id.* at 3587, 4071-72, 4282-83.

Petitioner urges that Mountain Coal "refused to engage in the interactive process with him. . . ." Pet. at 2. In fact, the undisputed evidence shows that Mountain Coal determined that Petitioner was not a qualified individual with a disability and thus that the ADA's accommodation provisions did not apply. C.A. App. 1524.

Petitioner is correct that he did not present any expert testimony on the job market within the relevant geographic area. Pet. at 5. Petitioner never actually delineated the relevant geographic area, but only indicated that he had previously worked in jobs in the towns of Delta, Grand Junction, Gunnison, Hotchkiss, Kremmling, Lazear, Montrose, Paonia, and Somerset, Colorado. C.A. App. 3654-56. He showed that there were two other coal mines in the area, but did not present any evidence concerning what jobs may have been available at those mines. *Id.* at 3341, 3655. He also showed that he had prior experience in ranching, farming, maintenance, and mechanical work, but did not present any evidence about what jobs may have been available in those fields in the relevant geographic area. *Id.* at 3560, 3654. His co-plaintiff, who had a similar work background and was terminated around the same time, was able to find work at another mine, a sawmill, and some construction companies. *Id.* at 2432, 3391-92, 3514.

3. *The District Court's Decision.* After the trial, Judge Krieger of the United States District Court for the District of Colorado granted Respondents' motion for judgment as a matter of law under Fed. R. Civ. P. 50, concluding that Petitioner failed to present sufficient evidence to show that he was regarded as disabled in the major life activity of working. Pet. App. 37a-44a, 57a.

The district court held that the salient question was whether Respondents subjectively believed that Petitioner's lifting restrictions prevented him from working in a class or a broad range of jobs. *Id.* at 34a-38a. The court noted that Petitioner "put on no evidence of the types of jobs available in and around Somerset, Colorado using the same or similar skills and knowledge as jobs at the West Elk Mine." *Id.* at 38a. The court added, "The mere recitation of the handful of jobs that the Plaintiffs subsequently found provides no picture of the general labor market around Somerset, Colorado, much less indicates whether their medical restrictions would exclude them from few, many, or most of those local jobs." *Id.* at 38a-39a.

Thus, the court held that, at most, Petitioner and his co-plaintiff showed that Mountain Coal had a blanket no-restrictions policy and regarded them as being unable to perform any jobs at its mine. *Id.* at 32a, 39a. Nonetheless, Petitioner's claims still failed because he did not provide "sufficient evidence that

the West Elk Mine jobs alone are sufficiently diverse to themselves constitute a 'class of jobs.'" *Id.* at 42a.[2]

4. *The Court of Appeals' Decision.* The Tenth Circuit affirmed the district court's decision. The court noted that the parties disputed various factual issues, including whether the mine applied a no-restrictions policy, but found that Petitioner presented sufficient evidence to show that Mountain Coal regarded him as substantially limited in the ability to perform his former position and had a no-restrictions policy preventing employees with medical restrictions from working at the mine. *Id.* at 9a.

However, the court held that under the ADA, the EEOC's regulations, and prior opinions on the issue, Petitioner failed to present sufficient evidence to show that Mountain Coal regarded him as substantially limited in his ability to perform a class or broad range of jobs. *Id.* at 5a-13a. With respect to a class of jobs, the court held that the no-restrictions policy was not itself sufficient to prove that Mountain Coal regarded Petitioner as substantially limited in his ability to work in any jobs outside the mine and

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[2] The claim of Petitioner's co-plaintiff succeeded only because he testified that one of the managers involved in the decision to terminate his employment commented that his restrictions might preclude him from working in the mining industry – which might qualify as a class of jobs. C.A. App. 42a-44a. However, as the district court and Tenth Circuit both found, this comment was not directed at and did not pertain to Petitioner. *Id.* at 12a, 43a-44a.

that "[Petitioner] did not put on other evidence describing the jobs available in the area that fell into the class of 'mining jobs,' nor did he produce evidence demonstrating that mining jobs are, in fact, a class of jobs." *Id.* at 10a. Likewise, the court held, the policy did not itself support a finding that Mountain Coal regarded Petitioner as unable to perform a broad range of jobs outside the mine, and "[Petitioner] did not produce evidence describing the jobs available in the area." *Id.*

As to the West Elk Mine itself, the court held that "there was no evidence . . . that the jobs within the mine could properly be described as a 'class of jobs' or a 'broad range of jobs.'" *Id.* at 11a. Citing the applicable regulation, 29 C.F.R. § 1630.2(j)(3)(ii)(C), the court explained that Petitioner "show[ed] only that West Elk Mine had a variety of mining jobs," but not that "those jobs fell into different classes, or that the jobs would require different skills and training from [Petitioner's] job at the mine." Pet. App. 11a.

Finally, based on an absence of evidence, the court dismissed Petitioner's argument that pretext evidence concerning the reasons for his termination could assist him in showing that Mountain Coal regarded him as disabled. *Id.* at 13a. Noting that "Mountain Coal . . . has not claimed that the lifting restrictions played no role in [Petitioner's] firing . . . [and] has not given any alternative reason for firing [Petitioner]," the court held that "Mountain Coal

cannot be said to have created a pretextual reason for firing [Petitioner]." *Id.*

REASONS FOR DENYING THE PETITION

Each of the four questions presented for review involves application of the legal standards for claims that an individual is regarded as disabled in the major life activity of working under the ADA. These standards are well developed and consistently applied by the federal circuit courts. The standards also have been substantially modified by the recent amendments to the ADA. Because Petitioner does not raise any circuit splits or any issues of federal law that remain relevant under the amended ADA, the Petition should be denied.

In order to come within the anti-discrimination and accommodation provisions of the ADA, a plaintiff must first establish that he is a "qualified individual with a disability" under the Act. 42 U.S.C. § 12112(a), (b) (1990); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 477 (1999), *overruled by statute*, ADAAA, Pub. L. No. 110-325, 122 Stat. 3553. At the time in question, the ADA defined a "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or

> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1990).

As to the third definition, which is at issue in this case, under the previous language of the ADA, an individual was regarded as having a disabling impairment when an employer mistakenly believed either that he "ha[d] a physical impairment that substantially limit[ed] one or more major life activities" or that his "actual, nonlimiting impairment substantially limit[ed] one or more major life activities." *Sutton*, 527 U.S. at 489. *See also* 29 C.F.R. § 1630.2(l) (1991); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521-22 (1999). In either instance, the individual had to prove he was regarded as substantially limited in at least one major life activity. *See Sutton*, 527 U.S. at 489-91.

When the major life activity was that of working, as in this case, "the statutory phrase 'substantially limits' require[d], at a minimum, that plaintiffs allege they [were] unable to work in a broad class of jobs." *Id.* at 491.[3] Thus, "one must be precluded from more

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[3] Respondents contend that "working" was not a recognized major life activity under the prior version of the ADA. This Court has never determined that working is a major life activity and has expressed some reluctance to do so. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200 (2002), *overruled by statute*, ADAAA, Pub. L. No. 110-325, 122 Stat. 3553; *Sutton*, 527 U.S. at 492. Nonetheless, this issue is moot under the

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than one type of job, a specialized job, or a particular job of choice." *Id.* at 492. *Accord Murphy*, 527 U.S. at 523 ("[T]o be regarded as substantially disabled in the major life activity of working, one must be regarded as precluded from more than a particular job."); 29 C.F.R. § 1630.2(j)(3)(i) (1991) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.").

The EEOC regulations issued under the previous version of the ADA, which have been cited by this Court and applied consistently by the circuit courts, provide that, with respect to the major life activity of working, "[t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i) (1991), *cited in Murphy*, 527 U.S. at 523, and *Sutton*, 527 U.S. at 491. The regulations further provide a list of factors to consider in determining whether an employee is substantially limited in the major life activity of working, including (a) "[t]he geographical area to which the individual has reasonable access," (b) the job from which the individual was disqualified due to an impairment and "the number and types of jobs utilizing similar

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newly-modified language of the ADA, which defines major life activities to include working. 42 U.S.C. § 12102(2)(A) (2008).

training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs)," and (c) the job from which the individual was disqualified due to an impairment and "the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes)." 29 C.F.R. § 1630.2(j)(3)(ii) (1991).

All of these issues are no longer germane for claims arising after January 1, 2009, the date on which the ADAAA went into effect. The circuit courts have uniformly held that the ADAAA does not apply retroactively. *See, e.g., Lytes v. D.C. Water & Sewer Auth.*, 572 F.3d 936, 939-42 (D.C. Cir. 2009); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565-67 (6th Cir. 2009). *See also Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (unless Congress clearly expresses a contrary intent, statutes that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" apply only prospectively). Accordingly, as even Petitioner concedes, the ADAAA does not affect the legal standards applicable to Petitioner's claims.

Under the modified provisions of the ADA, an individual can satisfy the requirement of being regarded as disabled simply by "establish[ing] that he or she has been subjected to an action prohibited

under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*." 42 U.S.C. § 12102(3)(A) (2008) (emphasis added). Thus, in regarded-as-disabled claims, it is no longer necessary for plaintiffs to prove (as Petitioner was required to prove) that they were regarded as substantially limited in a major life activity. As a result, the issues raised by Petitioner are now moot.

I. Petitioner has shown no compelling reason for this Court to consider whether a plaintiff may use pretext evidence to prove that he is regarded as disabled.

Petitioner contends that this case presents a split of authority among the circuit courts concerning whether pretext evidence may be evidence that an employee is regarded as disabled under the first step of the *McDonnell Douglas* framework. Pet. at 9-17. There is no circuit split on this issue, since the cases can be harmonized based on their factual differences. Moreover, this case does not even address the issue of pretext, or the *McDonnell Douglas* framework more generally, because the parties did not dispute the reason for Petitioner's termination and Petitioner did not present any pretext evidence. Finally, the issue does not concern an important question of federal law warranting Supreme Court review, since it is moot (or, at the very least, substantially modified) under the current language of the ADA.

In prior decisions setting forth the *McDonnell Douglas* burden-shifting framework for proving discriminatory treatment through circumstantial evidence, this Court has held that a plaintiff must initially make out a *prima facie* case of discrimination, after which the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action. Under the final step of the analysis, the plaintiff bears the burden of persuasion to show that the employer's stated reason is a pretext for discrimination. *See, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-12 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

"Pretext," as used in the *McDonnell Douglas* analysis, does not refer to ordinary factual disputes or allegations of falsehood, as Petitioner suggests. Pet. at 14-15. Rather, "'pretext' means 'pretext for discrimination.'" *St. Mary's Honor Ctr.*, 509 U.S. at 516. *Accord McDonnell Douglas*, 411 U.S. at 805 (pretext means "a coverup for a . . . discriminatory decision").

In recent years, some circuit courts have extended the use of *McDonnell Douglas* pretext evidence in regarded-as-disabled cases, such that evidence that an employer gave false reasons for its challenged actions could assist a plaintiff in proving that he was regarded as disabled, when it was paired with other strong evidence suggesting that the

employer believed the plaintiff could not perform a class or broad range of jobs. *See, e.g., Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 473-77, 480-84 (6th Cir. 2005) (plaintiff's employer told him his alleged performance problems were caused by alcoholism, told his wife he was an alcoholic and "will never be cured," forced him to take a fitness-for-duty examination, provided false performance-based reasons for his termination, and believed he could not perform any of his diverse job duties as a manager); *Ross v. Campbell Soup Co.*, 237 F.3d 701, 702-09 (6th Cir. 2001) (plaintiff's employer created a file on his back injuries, referred to him as the "back case," followed him to medical appointments, commented "we can't have any more of this back thing," stated on a job accommodation form that he was disabled, and provided false performance-based reasons for his termination); *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1224-25, 1228-29 (9th Cir. 2001) (plaintiff's employer refused to consider her for thirteen job openings, provided false reasons for such refusal, and told her "maybe you'll get a [medical] release, and you can apply for another job").

Petitioner urges that two circuit courts have rejected such use of pretext evidence, thereby creating a split of authority on the issue. Pet. at 11-12. To the contrary, the differing decisions among the courts are attributable to the different factual scenarios presented in the cases. *See generally* Jennifer Schechter Sharret, *Refining the Production Burden for "Regarded as Disabled" Claimants*, 28 Cardozo L. Rev.

991, 1009-11 (2006) (recognizing factual variance among the cases).

For instance, Petitioner contends that the Seventh Circuit rejects any such use of pretext evidence. Pet. at 12. It is true that the court declined to consider a plaintiff's disagreement with the stated reasons for his termination, when – in contrast to the substantial evidence presented in *Moorer*, *Ross*, and *Johnson* – he offered no evidence showing that his employer perceived him as disabled or terminated him because of his medical condition. *Nese v. Julian Nordic Constr. Co.*, 405 F.3d 638, 641-43 (7th Cir. 2005). However, in an earlier case, the Seventh Circuit expressly considered the plaintiff's pretext evidence, along with his other evidence, in concluding that he failed to create a triable issue as to whether he was regarded as disabled. *Mack v. Great Dane Trailers*, 308 F.3d 776, 783 (7th Cir. 2002). Thus, the Seventh Circuit has not, as Petitioner suggests, categorically held that pretext evidence can never play a role in the regarded-as-disabled analysis.

Petitioner also argues that the Tenth Circuit rejects the use of pretext evidence to establish that a plaintiff is regarded as disabled. Pet. at 11. Yet in this case, as in the only other Tenth Circuit case considering the issue, the plaintiff did not present any pretext evidence. In *Rakity v. Dillon Companies*, the court found that the *McDonnell Douglas* framework, including the pretext analysis, did not apply because "[t]he framework is only necessary where a defendant claims the adverse employment action was made for

reasons other than the plaintiff's membership in a protected class," but in that case "[the employer] freely admit[ted] the decision not to promote Mr. Rakity was made because of Mr. Rakity's lifting restriction." 302 F.3d 1152, 1165 (10th Cir. 2002). The court accordingly found that the plaintiff's reliance on *Ross* was "misplaced." *Id.*

Indeed, the *Rakity* court did not summarily reject the Sixth Circuit's holding in *Ross*, but simply rejected the plaintiff's misapplication of *Ross* to suggest that "the issue of pretextually concealed discrimination and the issue of 'regarded as' disabled should be treated as one and the same." *Id.* This did not create any conflict among the circuits: the fact that the Tenth Circuit recognized that these are separate issues does not signify that evidence of one issue could not also support a finding as to the other.

Similarly, in this case, the Tenth Circuit did not rule that courts could never consider pretext evidence in the regarded-as-disabled analysis. Nor did it cite or apply the *McDonnell Douglas* framework. Rather, the court simply held that there was no pretext evidence in this case: "Mountain Coal has disputed whether it categorically applies its 'no-restrictions policy,' but has not given any alternative reason for firing Mr. Dillon. Thus, Mountain Coal cannot be said to have created a pretextual reason for firing him." Pet. App. 13a.

Therefore, there is no actual split of authority on this issue; and even if there were, it would not impact

this case because pretext evidence was never at issue. Petitioner highlights certain facts that were disputed at trial, such as the extent to which the no-restrictions policy was enforced, Petitioner's ability to perform certain job assignments within his lifting restrictions, and certain events leading up to his termination. Pet. at 15. Yet these contested facts have nothing to do with pretext – particularly as the reason for Petitioner's termination (*i.e.*, that Mountain Coal believed he could not perform his job duties consistent with his restrictions and was not qualified to perform any of the vacant positions at the mine) was never in dispute.

Finally, in enacting the ADAAA in 2008, Congress fundamentally altered the analysis in regarded-as-disabled cases, which also impacts the effect of pretext evidence. Now, regarded-as-disabled plaintiffs no longer need to show that they are perceived as substantially limited in their ability to work or engage in any other major life activity – and thus no longer need to prove that they are perceived as substantially limited in their ability to work in a class or broad range of jobs. It will be sufficient simply to show that they are subjected to some employment action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A) (2008).

In prior cases, courts applied an expansive view of pretext evidence specifically because of the difficulties inherent in proving that an individual is

regarded as substantially limited in the major life activity of working. *See*, *e.g.*, *Ross*, 237 F.3d at 709 (noting that such a claim "takes a plaintiff to the farthest reaches of the ADA" and is "extraordinarily difficult" to prove). Now that plaintiffs no longer have to prove they are regarded as substantially limited in a major life activity – only that they have a perceived impairment, regardless of whether it restricts any major life activities – the courts will have to reassess whether and to what extent pretext evidence applies in the *McDonnell Douglas* analysis. Reviewing this case would not resolve these new issues, which should be decided initially by the lower courts.

II. Petitioner has shown no compelling reason for this Court to consider whether a plaintiff must present job market evidence to prove that he is regarded as disabled in the ability to work.

Petitioner claims that the circuit courts are split on the issue of whether ADA plaintiffs must present evidence of the job market in the relevant geographic area in order to prove they are regarded as disabled in the major life activity of working. Pet. at 17-23. Here, too, there is no circuit split. Rather, the courts have consistently applied this Court's prior decisions and the EEOC's regulations in determining whether a plaintiff has made a sufficient showing in each particular case. Because the issue of whether a person is regarded as disabled is individualized in nature, the extent to which plaintiffs must present

evidence of the relevant job market necessarily depends on the other types of evidence they provide showing that they are regarded as substantially limited in their ability to work. Thus, no split of authority exists. Moreover, this issue, too, is moot under the 2008 amendments to the ADA, further militating against certiorari review.

In *Sutton*, this Court applied the EEOC's regulations (which the Court assumed, without deciding, were valid) to conclude that plaintiffs who allege they were regarded as disabled in the major life activity of working must prove they were perceived as substantially limited in their ability to work in a "broad class" or "broad range" of jobs. *Id.* at 491-93. The Court ultimately held that two plaintiffs' proof that they were regarded as unable to work as global airline pilots due to their vision impairments was insufficient, even if the plaintiffs assumed that other employers would apply the same vision requirements that had disqualified them from working as pilots for the defendant. As the Court noted, "[i]t is not enough to say that if the physical criteria of a single employer were *imputed* to all similar employers one would be regarded as substantially limited in the major life activity of working *only as a result of this imputation*." *Id.* at 493 (emphasis in original). Because the plaintiffs had not shown that their employer believed their vision impairments substantially limited them from working in other positions utilizing their skills, their claims failed. *Id.* at 493-94.

In *Murphy*, this Court again applied the EEOC's regulations and found that the plaintiff, a mechanic diagnosed with hypertension, had not satisfied his burden of showing he was regarded as disabled in the major life activity of working. 527 U.S. at 523-24. Specifically, the Court found that the plaintiff was, "at most, regarded as unable to perform only a particular job" – that of mechanic in a job requiring him to drive commercial motor vehicles – which was not sufficient to establish a claim. *Id.* at 525.

Consistent with *Sutton*, *Murphy*, and the EEOC's regulations, the circuit courts have held that a plaintiff seeking to prove he is regarded as disabled in the major life activity of working must show that his employer believed he was unable to perform a class or a broad range of jobs. The courts have further held that this required showing includes evidence of alternative jobs in the relevant geographic market when other evidence is insufficient on its own to establish the regarded-as-disabled issue.

For instance, in *EEOC v. Rockwell International Corp.*, the Seventh Circuit declined to "create a *per se* rule that a plaintiff cannot prevail without quantitative evidence of the precise characteristics of the local job market," but noted that "this is not one of the rare cases in which the claimants' impairments are so severe that their substantial foreclosure from the job market is obvious." 243 F.3d 1012, 1017 (7th Cir. 2001). The court ultimately affirmed the summary dismissal of the plaintiffs' regarded-as-disabled claims, stating that "the Commission had to come up

with some evidence of the number and types of other jobs in Southern Illinois from which the job applicants would be excluded because of their perceived impairments," but failed to do so. *Id.* at 1017-18.

The other circuit courts have similarly held that plaintiffs cannot prevail on regarded-as-disabled claims without showing that they were perceived as unable to perform a class or a broad range of jobs, as those terms are defined in the regulations. *See, e.g.*, *Milholland*, 569 F.3d at 568; *Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110, 117-18 (1st Cir. 2004); *Cooper v. Olin Corp.*, 246 F.3d 1083, 1089-90 (8th Cir. 2001); *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366,1370-71 (11th Cir. 1998); *Bridges v. City of Bossier*, 92 F.3d 329, 334-36 (5th Cir. 1996).[4]

The Tenth Circuit's decision fits well within this line of authority. The court applied the same legal standards in determining that Petitioner failed to show that Mountain Coal regarded him as substantially limited in his ability to work in either a class of mining jobs within the relevant geographic

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[4] *Duncan v. Washington Metropolitan Area Transit Authority*, cited by Petitioner, Pet. at 19-20, applies a similar test concerning disabilities in the major life activity of working, but is not on all fours with this line of cases because the plaintiff alleged that he was *actually* disabled, rather than *regarded as* disabled. 240 F.3d 1110, 1114-16 (D.C. Cir. 2001). Nonetheless, as the case suggests, the courts apply similar standards to actual disability cases.

area or a broad range of other jobs within that area. Pet. App. 5a-13a.

Petitioner cites only two federal cases that he argues represent a contrary view. Pet. at 18-19. In truth, neither case reveals any split of authority on the issue of whether evidence of the relevant job market is required in regarded-as-disabled cases concerning the ability to work.

In *Mullins v. Crowell*, the Eleventh Circuit in fact confirmed that plaintiffs seeking to show they are actually (as opposed to regarded as) disabled in the ability to work must provide evidence of the jobs available to them in the relevant geographic area. 228 F.3d 1305, 1314 n.18 (11th Cir. 2000). The court merely stated that such plaintiffs are not required to present *expert testimony* on this issue. *Id.* Petitioner quotes at length from the opinion, Pet. at 18, but replaces with ellipses the words that establish this point:

> [B]ecause we have been instructed that we "may" and "should" (not "shall" or "must") consider the existence of jobs in the relevant geographical area, without reference to whether a vocational expert is required, we conclude that expert vocational evidence, although instructive, is not necessary to establish that a person is substantially limited in the major life activity of working. Furthermore, a plaintiff could testify from his or her own extensive job search whether other jobs

> that he or she could perform were available in the geographical area.

Id. (omitted words indicated in underscoring).

Additionally, in *Wellington v. Lyon County School District*, the Ninth Circuit held that a plaintiff proved he was actually (rather than regarded as) disabled in the ability to work, although he did not present evidence of the jobs available to him in the area. 187 F.3d 1150, 1155 (9th Cir. 1999). However, the plaintiff, a janitor who suffered from carpal tunnel syndrome, had established through other evidence that he was substantially limited in his ability to perform a class or broad range of jobs: he testified that his prior work experience was limited to manufacturing, construction, heavy maintenance, and plumbing and that "he had to quit a job performing even *light* plumbing because he 'was in too much pain to even continue'"; and his doctor testified that he was "permanently unable to perform work involving 'metal fabrication, welding, . . . heavy activities, carpentry, . . . the use of a variety of tools to do maintenance repairs, et cetera.'" *Id.* (emphasis in original) (citations omitted).[5]

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[5] In another case cited by Petitioner, Pet. at 21-22, an Iowa state court similarly concluded that the plaintiff had created a triable issue as to whether she was actually disabled in the activity of working, because she showed that "she cannot do *any* production line work to which she has reasonable access" and such production line work could constitute a class of jobs.

(Continued on following page)

In a later case, the Ninth Circuit distinguished *Wellington* and clarified that "[u]nder the law of our circuit, a plaintiff must present evidence about relevant job markets to defeat summary judgment on a claim of substantial limitation of 'working.'" *Thornton v. McClatchy Newspapers*, 261 F.3d 789, 795-96 (9th Cir. 2001). In finding that the plaintiff had failed to satisfy this burden, the court noted that "*Wellington* involved unrebutted medical evidence about the various types of jobs from which the plaintiff was permanently restricted," but "there was no such evidence of restriction" and no evidence about the relevant job market in the latter case. *Id.* at 796.

These cases do not reveal any circuit split on the requirement of evidence concerning the relevant job market in regarded-as-disabled cases involving the ability to work. Rather, they demonstrate that the courts consistently apply the legal standards set forth by this Court's prior decisions and the EEOC's regulations, while illustrating that the issue of whether a person is disabled or regarded as disabled is individualized in nature. *See generally Sutton*, 527 U.S. at 483 ("[W]hether a person has a disability under the ADA is an individualized inquiry."); *Toyota Motor Mfg.*, 534 U.S. at 198 ("That the Act defines 'disability' 'with respect to an individual,' 42 U.S.C. § 12102(2), makes clear that Congress intended the

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Bearshield v. John Morrell & Co., 570 N.W.2d 915, 922 (Iowa 1997) (emphasis in original).

existence of a disability to be determined in . . . a case-by-case manner.").

Finally, this issue is also moot under the recently-modified language of the ADA. Plaintiffs alleging that they are regarded as disabled no longer must prove that they are perceived to be substantially limited in a major life activity, but only need to show that they are subjected to some action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A) (2008). This eviscerates the requirement that plaintiffs in cases such as this one prove that their employer believed they were incapable of performing a class or a broad range of jobs. The fact that the issue raised by Petitioner is no longer relevant strongly warrants against certiorari review.

III. Petitioner has shown no compelling reason for this Court to consider whether a plaintiff may prove he is regarded as disabled in the ability to work through evidence of jobs at a single facility.

Petitioner urges that the circuit courts disagree on the issue of whether a plaintiff can establish that he is regarded as disabled in the major life activity of working based solely on evidence of the positions available within a single facility. Pet. at 24-30. Again, there is no circuit split on the issue. The courts have agreed on the applicable legal standards and have

simply applied those standards to the facts of each case – including facts about other jobs a plaintiff was deemed incapable of performing – to ascertain whether the plaintiff showed that he was perceived as unable to perform a class or broad range of jobs. Also, again, the issue is moot under the 2008 amendments to the ADA, which eliminate the requirement that regarded-as-disabled plaintiffs prove they are regarded as substantially limited in a major life activity. Therefore, there is no compelling reason to grant certiorari review.

Applying the well-settled legal standards set forth in *Sutton*, *Murphy*, and the regulations, the circuit courts have agreed that a regarded-as-disabled plaintiff may satisfy his burden of proof based solely on evidence that he is perceived as incapable of performing any position for a single company – but only when he establishes that the positions within that one company can themselves constitute a class or a broad range of jobs.

For instance, in *D'Angelo v. ConAgra Foods, Inc.*, the Eleventh Circuit stated, in *dicta*, that the plaintiff presented sufficient evidence that she was regarded as disabled where her employer admitted that it believed her vertigo prevented her from being around any moving equipment and precluded her from "a wide range of jobs" within its seafood processing plant, including stacker, product transporter, saw operator, stein operator, checker, forklift driver, area specialist, line leader, machine operator, packer, and spreader. 422 F.3d 1220, 1222, 1228 n.5 (11th Cir.

2005) (citation omitted). The court concluded that "[s]uch a far-reaching impairment – which would disqualify her from the entire class of factory jobs, and from many others – would substantially limit D'Angelo's ability to work." *Id.* at 1228 n.5.

The other cases cited by Petitioner are consistent with this approach. *See Rodriguez v. ConAgra Grocery Prods. Co.*, 436 F.3d 468, 477 (5th Cir. 2006) (defendant believed plaintiff was "unfit to perform *any* manual labor job" and was not qualified for any jobs at its food processing plant, including an entry level position "requir[ing] only the most basic skills and abilities") (emphasis in original); *Moorer*, 398 F.3d at 484 (defendant believed plaintiff could not perform any managerial work for the defendant, including such varied tasks as "planning hospital affairs, coordinating reporting requirements between different departments, directing human resource programs, serving as a liaison between staff and management, ensuring regulatory compliance, coordinating the budget process, facilitating a positive work environment, ensuring the proper level and mix of services, coordinating risk management, creating continuing education programs, and spearheading cost-saving techniques"); *Buskirk v. Apollo Metals*, 307 F.3d 160, 163, 167 (3d Cir. 2002) (defendant believed plaintiff could not perform any jobs involving "general physical activity," including such positions within its metal making plant as slitter helper, polisher, finish helper, box maker, and pre-polisher) (citation omitted). *See also Cook v. Rhode Island*, 10 F.3d 17,

25-26 (1st Cir. 1993) (concluding, under similar provisions of the Rehabilitation Act, that plaintiff showed she was regarded as handicapped in her ability to work through evidence that she was denied "a single job that requires no unique physical skills" and was perceived as "foreclosed [from] a broad range of employment options in the health care industry, including positions such as community living aide, nursing home aide, hospital aide, and home health care aide").[6]

The Tenth Circuit has applied the same approach, demonstrating that there is no circuit split on this issue. In a decision released just a year before the decision in this case, the Tenth Circuit held that a plaintiff created a triable issue as to whether he was regarded as disabled in the major life activity of working based on evidence of the jobs available at a single plant. *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1087-88 (10th Cir. 2008). In *Justice*, the court held that the plaintiff, an electrician, satisfied his burden of proof by showing that his employer believed his vertigo and balance problems significantly restricted him from "perform[ing] an entire class of jobs utilizing his skills, i.e., those jobs in the electrical field," stated that he could perform only "one or two jobs among the variety of jobs in the

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[6] The other case cited by Petitioner is inapplicable, because it involved the major life activity of *walking* – not working. *EEOC v. E.I. DuPont de Nemours & Co.*, 480 F.3d 724, 729-30 (5th Cir. 2007).

plant," and considered him only for the position of janitor. *Id. See also Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1134 (10th Cir. 2003) (plaintiff created a factual issue as to whether she was regarded as disabled based on evidence of jobs within a single company, insofar as the defendant failed to consider her for a position at a time when it was hiring 200 to 300 people per week).

The Tenth Circuit reached a different conclusion in this case – not because it was departing from *Crown Cork*, *Doebele*, and similar cases, but because Petitioner did not show "that the jobs within the mine could properly be described as a 'class of jobs' or a 'broad range of jobs.'" Pet. App. 11a. Specifically, the court explained, Petitioner "show[ed] only that West Elk Mine had a variety of mining jobs," but not "that those jobs fell into different classes, or that the jobs would require different skills and training from [Petitioner's] job at the mine." *Id.*

Accordingly, there is no circuit split warranting certiorari review of this issue. Moreover, yet again, the issue is moot under the current language of the ADA, which no longer requires that regarded-as-disabled plaintiffs show they are perceived as substantially limited in a major life activity. For these reasons, the Court should deny the Petition.

IV. Petitioner has shown no compelling reason for this Court to consider whether no-restrictions policies are evidence of whether an employee is regarded as disabled in the ability to work.

Petitioner contends that the circuit courts have reached conflicting decisions as to whether a no-restrictions or 100%-healed policy may be used to show that an employer regards an individual as disabled in the major life activity of working. Pet. at 30-36. There is no such conflict, as the Tenth Circuit's conclusion that such policies may be evidence of a perceived disability – but are not themselves conclusive evidence of any such perceived disability – accords with the decisions of other circuits. Additionally, once again, the issue is moot under the ADAAA. Thus, there is no compelling reason for certiorari review.

Petitioner is correct that some circuit courts have held that no-restrictions or 100%-healed policies may constitute *per se* evidence of discrimination under the ADA. Pet. at 31-33. However, such holdings are limited to instances where employees are found to be "qualified individuals with disabilities" covered by the Act.

The Third Circuit recently addressed this issue in reversing the certification of a class of individuals alleging violation of the ADA through application of a 100%-healed policy and other actions involving failure to reasonably accommodate disabilities. *Hohider*

v. United Parcel Serv., 574 F.3d 169, 172-73, 186-98 (3d Cir. 2009). The plaintiffs argued that a 100%-healed policy is *per se* unlawful and, thus, that once they established the existence of such a policy they would need no further proof to establish liability under the ADA. *Id.* at 194-95.

The *Hohider* court rejected the plaintiffs' argument, stating that even if such a policy were a *per se* violation of the ADA, the plaintiffs still would have to prove they were disabled within the meaning of the Act: "[A]n employer's '100% healed' policy, even if deemed per se discriminatory, cannot give rise to a finding of liability and relief under the ADA without the statutorily required inquiry into whether those affected by the policy are disabled. . . ." *Id.* at 195. The court further held that the issue of whether individual plaintiffs were qualified individuals with disabilities could not be determined on a class-wide basis because it was an individualized inquiry. *Id.* at 196-98.

The Sixth Circuit arrived at the same conclusion, stating that "a 100% [healed] rule is impermissible as to a *disabled* person – but one must first be disabled." *Henderson v. Ardco, Inc.*, 247 F.3d 645, 653 (6th Cir. 2001) (emphasis in original). The court also rejected the plaintiff's argument that it should simply find that the 100%-healed rule was a *per se* violation of a state law mirroring the provisions of the ADA, finding that this argument "foreshortens the inquiry." *Id.* at 648-49, 653.

The fact that the Ninth Circuit has held that a 100%-healed policy is a *per se* violation of the ADA does not suggest that there is a split of authority on the issue. *See McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999). As *Hohider* and *Henderson* suggest, this holding is inconsequential unless an individual is actually covered by the Act. Indeed, the *McGregor* panel stated only that a 100%-healed policy "discriminates against qualified individuals with disabilities," but never expressed that a plaintiff would automatically qualify as a disabled (or regarded-as-disabled) individual under the Act simply by proving such a policy existed. *Id.* at 1115-16. Moreover, in a later case, the Ninth Circuit treated a no-restrictions policy as evidence that an employee was regarded as disabled in the ability to work, but did not suggest that the existence of the policy could by itself prove such a claim. *Johnson*, 251 F.3d at 1128.

Nor did the Tenth Circuit's decision in this case create any circuit conflict. The court determined that Petitioner had not presented sufficient evidence to prove that he was regarded as disabled. Given that Petitioner failed to show that he fell within the provisions of the ADA, the existence or application of the alleged no-restrictions policy is legally irrelevant.

The Tenth Circuit did, however, recognize, consistent with the other circuits, that a no-restrictions policy may be considered along with other evidence in determining whether a plaintiff was regarded as disabled in the major life activity of working.

For instance, as indicated above, the Ninth Circuit in *Johnson* reviewed a 100%-healed policy, along with a multitude of other evidence – including the employer's refusal to consider her for thirteen job openings, provision of false reasons for such refusal, and comment that "maybe you'll get a [medical] release, and you can apply for another job" – in finding that the plaintiff had offered sufficient evidence to show that she was regarded as unable to work in a class or broad range of jobs. 251 F.3d at 1226-29.

Similarly, the Sixth Circuit found that evidence of the plant manager's testimony that "there is not a job at the plant that [the plaintiff's] restrictions would not bump into" and the variety of positions at the plant that would not infringe upon her restrictions were sufficient, along with evidence of a 100%-healed policy, to avoid summary judgment on a regarded-as-disabled claim under state law. *Henderson*, 247 F.3d at 648-54. The court found that this evidence suggested that the plaintiff's employer believed she was "incapable of work in a manufacturing operation." *Id.* at 652. However, the court noted that at trial, the plaintiff would have to present evidence "to show that manufacturing presents a significant portion of the jobs locally available to her." *Id.* at 653 n.5.

In this case, the Tenth Circuit did not conclude that the no-restrictions policy could not be used to support Petitioner's claims. Rather, it simply held that the policy was not itself sufficient to satisfy Petitioner's burden of showing that he was regarded

as disabled in the ability to perform a class or broad range of jobs, and that Petitioner had not presented sufficient additional evidence to make that showing. Pet. App. 10a-11a. Thus, the decision is fully consistent with *Johnson* and *Henderson* and does not create any circuit split relating to no-restrictions policies.

Additionally, the ADAAA substantially altered the analysis on this issue. ADA plaintiffs asserting regarded-as-disabled claims no longer need to show that they are perceived as substantially limited in any major life activity. Thus, the purpose for which the Tenth Circuit reviewed the no-restrictions policy – the issue of whether Petitioner proved he was regarded as substantially limited in the major life activity of working – is no longer pertinent. The Petition should, therefore, be denied.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: December 22, 2009.

Respectfully submitted,

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APPENDIX – REGULATIONS INVOLVED

29 C.F.R. § 1630.2

(j) Substantially limits –

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working –

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having

comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

* * *

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.